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IN THE

# Supreme Court of the United States

NEW JERSEY PEACE ACTION; PAULA ROGOVIN; ANNA BERLINRUT; WILLIAM JOSEPH WHEELER,

*Petitioners,*

—v.—

BARACK H. OBAMA, President of the United States, in his official capacity,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. Whether the Court of Appeals erred in dismissing Plaintiffs' petition for a Declaratory Judgment concerning the meaning of Article I, Section 8, Clause 11 of the Constitution on the ground that the President would be likely to ignore such a declaration?

2. Does the Judiciary Have the Power to Effectuate the Procedural Requirements of the Declare War Clause of the Constitution?

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## OPINIONS BELOW

On May 10, 2010, the Court of Appeals for the Third Circuit affirmed the decision of the United States District Court for the District of New Jersey. (App. at 1a.) The Circuit opinion is unreported (*Id.*), as is the opinion of the lower court (*Id.* at 14a).

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Third Circuit's opinion was rendered on May 10, 2010. (*Id.* at 1a-2a.) The Petition for Rehearing and Rehearing En Banc was denied on July 7, 2010. (*Id.* at 37a-38a.) On September 24, 2010, Justice Alito granted the Petitioners an extension of time within which to file a petition for a writ of certiorari to and including November 4, 2010.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

**United States Constitution, Article I Section 8.**

> The Congress shall have power . . . To declare War, grant Letters of Mark and Reprisal, and make Rules concerning Captures on Land and Water.

**Authorization for Use of Military Force Against Iraq Resolution of 2002, §3 (a), H.J. Res. 114, 107th Congress (2d Sess. 2002)**

> The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to –
>
> 1) defend the national security of the United States against the continuing threat posed by Iraq; and
> 2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

## STATEMENT OF THE CASE

On October 16, 2002, Congress gave President Bush the power to decide in his discretion to use military force against Iraq. Authorization for use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, 107th Congress (2d Sess. 2002). The words used – Authorization for Use of Military Force ("AUMF") – had their origin in 1955 during the Formosa Straits incident (1955) and have been used in the Middle East (1957), Vietnam (1964), Lebanon (1983), Iraq (1991), worldwide after the 9-11 attack (2001), and Iraq (2002).[1] But never before had an AUMF been

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[1] *See* DAVID ACKERMAN & RICHARD GRIMMETT, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL

used to authorize the President to invade a sovereign nation without clear provocation. In March 2003, the President ordered the invasion of Iraq, a nation that had not attacked the United States or any State, nor attempted an invasion or encouraged insurrection or rebellion within the United States.

In 2008, Plaintiffs commenced this action seeking a Declaratory Judgment that the AUMF against Iraq violated Article I, Section 8, Clause 11 of the U.S. Constitution. The Plaintiffs are New Jersey Peace Action, a 50-year-old non-profit advocacy organization working for peace and nuclear disarmament; William Joseph Wheeler, an Iraq war veteran who had been separated from the Army for medical reasons but was subject to recall at the time of filing of the Complaint; and two mothers, Paula Rogovin and Anna Berliner, of soldiers who had served tours of duty in Iraq.

The District Court dismissed the action on two grounds: lack of standing on the part of any plaintiff, and the political question doctrine. (App. at 35a-36a.)[2] The May 10, 2010 panel opinion, acting within its jurisdiction under 28 U.S.C. § 1291, affirmed the District Court without oral argument on the ground that none of the plaintiffs could demonstrate an injury that could be

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IMPLICATIONS 9-20, (Congressional Research Service, RL 31133, updated by Jennifer K. Elsea and Richard F. Grimmett 2007) (2003).

[2] The Third Circuit panel opinion found it unnecessary to address the issue of "political question." (App. at 10a n.5.)

redressed by judicial action, and that a Declaratory Judgment would be meaningless because the President and Congress would ignore it. (App. at 11a–13a.) A Petition for Rehearing *en banc* was dismissed by the Circuit on July 7, 2010. (App. at 37a–38a.)

Plaintiffs' Amended Complaint set forth in great detail the record of the Constitutional Convention and the debate over the Declare War Clause and its historical background. (App. at 41a-65a.) That history showed that on June 1, 1787, the Convention overtly rejected proposals that the President could, directly or indirectly, be given the power to take the nation to war. The Convention placed that power in the hands of Congress, the people's representatives. (App. at 53a ¶31.) That history was acknowledged by the U.S. Supreme Court during the Nineteenth Century. *See Bas v. Tingy*, 4 U.S. 37, 43, 1 L. Ed. 731, 734 (1800) ("Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, objects and time."); *Talbot v. Seeman*, 5 U.S. 1, 28, 2 L. Ed. 15, 24 (1801) (Marshall, C. J.) ("The whole powers of war, being by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry."); *The Prize Cases*, 67 U.S. 635, 668, 17 L. Ed. 459, 477 (1863) ("By the Constitution, Congress alone has the power to declare a national or foreign war.") No federal appellate court has ever examined the records of the Constitutional

Convention from June 1, with respect to the war powers of Congress.[3]

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[3] On May 29, 1787, the first working day of the Constitutional Convention, Virginia's Governor Randolph proposed a 15 point plan that structured the early debate. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. I, 20-23 (Yale University Press, 1911) (hereinafter "1 Farrand"). Before June 1, the Convention adopted a three-part government including a two-house legislature where the first branch was to be elected by the people. *Id.* at 45-47. On June 1, delegates considered the powers of the executive branch. There was no discussion about whether the executive should have the power to "carry into execution the national laws." *Id.* at 62-63. But the additional phrase – "it ought to enjoy the executive rights vested in Congress by the Confederation" – was immediately challenged by Charles Pinckney (South Carolina) who was afraid such "executive rights" would extend to "peace and war which would render the Executive a Monarchy of the worst kind, to wit an elective one." Pinckney was joined by three other delegates (Sherman of Connecticut, Wilson of Pennsylvania, and Rutledge of South Carolina) in criticizing the proposal. *Id.* at 63-66.

Historian Joseph Ellis explained the public attitude behind Pinckney's concern:

> At the very core of the revolutionary legacy . . . was a virulent hatred of monarchy and an inveterate suspicion of any consolidated version of political authority. A major tenet of the American Revolution – Jefferson had given it lyrical expression in the Declaration of Independence – was that all kings, and not just George III, were inherently evil. The very notion of a republican king was a repudiation of the spirit of '76 and a contradiction in terms.

JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 127-28 (Alfred A. Knopf, ed. Borzoi Books, 2005) (2001).

If the Circuit Court was correct that the President and Congress would ignore a Declaration by a lower federal court (App. at 11a), there is all the more reason why this Court should hear this case. Certainly, the President and Congress would not ignore a decision by the Supreme Court. Indeed, since World War II, lower federal courts have consistently refused to hear challenges to presidential exercises of war powers on various procedural grounds without review by this Court. *See e.g., Luftig v. McNamara*, 373 F.2d 664 (D.C.

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On June 1, 1787, the Convention rejected the proposal that the President could, either directly or indirectly, be given the power to take the nation to war, placing it in the hands of Congress. 1 Farrand at 67. The judgment of June 1 was supported on August 6 by a Committee on Detail that provided Congress with the power to "make war." THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. II, 181-82 (Yale University Press, 1966) (hereinafter "2 Farrand"). On August 17, "Make war" was modified to "declare war" expressly to allow presidents to "repel sudden attacks." *Id.* at 318. That change did not provide the president with independent authority to take the nation to war. The Convention, beginning on August 18, allowed Congress to authorize presidential hostilities only in the situations of invasion, insurrection, failure of federal law, and to protect states in similar situations. *See e.g.*, U.S. Const., Art. I, §8, Cl. 15; U.S. Const., Art. IV, §4. The limitation to those specific situations assured that presidential authority would not overstep that of Congress. *See id; see also Marbury v. Madison*, 5 U.S. 137, 175, 2 L. Ed. 60, 72 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.").

Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Myers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972); *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1999). The exception is one summary affirmance of a three-judge district court's dismissal of a challenge to the Vietnam War on "political question" grounds. *Attlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub. nom. Attlee v. Richardson*, 411 U. S. 911, 93 S. Ct. 1545; 36 L. Ed. 2d 304 (1973) (with three Justices voting to note probable jurisdiction.) It is time for this Court to step up and finally determine whether Americans are entitled to compel the presidency to defend in a court of law its expansive interpretation of the Constitution's Declare War Clause. *Marbury*, 5 U.S. 137.

## REASONS FOR GRANTING THE PETITION

### Introduction

The District Court granted the Defendant's motion to dismiss for failure to state a claim on grounds both of lack of standing and political question. (App. at 35a-36a.) The Court of Appeals affirmed for lack of standing, asserting that even if Plaintiffs could show injury in fact and causation, the relief sought (a Declaratory Judgment) would not redress their alleged injuries. (*Id.* at 9a-10a.) The Circuit found it unnecessary to address the issue of political question. (App. at 10a n.5.)

Neither of the courts below addressed the substantive constitutional issue presented by

Plaintiffs – the constitutionality of President Bush's decision to invade the sovereign nation of Iraq absent a declaration of war by Congress as required by Article I, Section 8, Clause 11 of the United States Constitution. Nevertheless, Petitioners respectfully submit that the issues of standing and redressability can be adequately addressed only through the prism of constitutional history demonstrating the Framers' intention to require a separation of powers over war between Congress and the President as reflected in the records of the Constitutional Convention of 1787 and to empower the People to enforce that separation. The record of June 1, 1787, has never been discussed in any Court of Appeals opinion, and has only been identified in *Orlando v. Laird*, 317 F. Supp. 1013 (E.D. N.Y. 1970). In *Orlando*, District Court Judge Dooling wrote:

> Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare war was pointedly denied to the presidency. In no real sense was there even an exception for emergency action and certainly not for self-defined emergency power in the presidency. The debates, so often strangely -- to our ears -- devoid of respect for and alive with fears of the presidency that the Convention was forming, are clear in the view that [ ] the power to make war and peace are legislative. [2 Farrand at 65, 73. ]

*Id.* at 1016. Despite his finding, Judge Dooling ruled that Congress' continued funding of the war in Vietnam constituted the equivalent of a declaration of war (*id.* at 1019-20), a determination that the Court of Appeals affirmed. 443 F.2d 1039, 1044 (2d Cir. N.Y. 1971).

## I. THE COURT OF APPEALS ERRONEOUSLY ASSUMED THAT THE PRESIDENT AND CONGRESS WOULD IGNORE A JUDICIAL DECLARATION INTERPRETING ARTICLE I, SECTION 8, CLAUSE 11 OF THE CONSTITUTION AND THUS COULD PROVIDE NO REDRESS FOR PETITIONERS' INJURIES.

The Third Circuit held that Petitioners failed to satisfy the redressability prong of the standing requirement as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 364 (1992). The Court determined that even if Petitioners met the injury in fact and causation requirements of standing, a Declaratory Judgment ruling that the President violated Article I, Section 8, Clause 11 of the Constitution by ordering the invasion of the sovereign nation of Iraq without a Congressional Declaration of War would not provide redress for those injuries. (App. at 11a.) The Court stated that a judicial declaration would have no "practical effect on the President and Congress in the face of any future [ ] military conflict," (*id.*) nor "inform any future actions by the President and Congress." (*Id.* at 13a.) The Circuit Court cited no authority

for this conclusion and there is none. If the Court of Appeals meant that the President might ignore a declaration from a lower federal court, that is all the more reason why this Court should intervene.

As this Court declared some 200 years ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. And most recently, in *Boumedienne v. Bush*, the Court re-confirmed the validity and power that a judicial declaration has to dictate how the President views the rights of the prisoners at Guantanamo when it stated: "We have no reason to believe an order from a federal court would be disobeyed at Guantanamo." 553 U.S. 723, 751, 128 S. Ct. 2229, 2251, 171 L. Ed. 2d 41, 68 (2008).

History has repeatedly shown this to be true. Although President Eisenhower did not privately endorse school desegregation after *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) was decided, the President enforced the Court's decree by sending troops to Topeka, Kansas, stating: "The Supreme Court has spoken, and I am sworn to uphold their – the constitutional processes in this country, and I am trying. I will obey." CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 126 (2004). Similarly, in *Cooper v. Aaron*, the Supreme Court affirmed the power of the courts to compel the nation to follow its judicial decree in *Brown* and decreed that local officials had a duty to obey a federal court order "resting on this Court's

considered interpretation of the United States Constitution." 358 U.S. 1, 4, 78 S. Ct. 1401, 1403, 3 L. Ed. 2d 5, 9 (1958). The Court stated that: "Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.'" 358 U.S. at 18.

Also, in *Youngstown Sheet & Tube Co. v. Sawyer*, after the President issued an order to take possession of most of the nation's steel mills to prevent labor disputes from halting production, the Court ordered that the President return the private property because the Constitution did not authorize the President to have this power. 343 U.S. 579, 586, 72 S. Ct. 863, 866, 96 L. Ed. 1153, 1167 (1952). The Court stated:

> The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.[4]

343 U.S. at 589. Immediately following the Court decision, the President ordered Secretary Charles Sawyer to return the steel mills. William H.

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[4] Similarly, in *Little v. Barreme*, the Court held that the President lacked the power to seize a vessel bound from a French port because the "act of Congress appear[ed] to have received a different construction from the executive of the United States . . . ." 6 U.S. 170, 178, 2 L. Ed. 243, 246 (1804).

Harbaugh, *The Steel Seizure Reconsidered*, 87 Yale L. J. 1272, 1275 (1978).

Likewise, a decision declaring the right of Congress only to Declare War will be accepted by future presidents as decided by the Court.

Moreover, the Court of Appeals erred when it stated that: "it is 'merely speculative' that any psychic benefits of declaratory relief would redress the 'emotional, physical[,] and psychological injur[ies]' already suffered by the plaintiffs in this case." (App. at 10a-11a.) According to 28 U.S.C. § 2201, a declaratory judgment is a form of redress that was created to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Professor Borchard, the father of the Declaratory Judgment Act, stated that "a court exerts a certain amount of judgment or discretion in determining whether a plaintiff or defendant has a legal interest in contesting the validity of a statute or administrative ruling. . . . [S]uch an interest . . . will be more readily perceived when large public interests are at stake." DECLARATORY JUDGMENTS 32 (Banks-Baldwin Law Publishing Co., 2d ed. 1941).

The President used the Authorization for Use of Military Force Against Iraq Resolution of 2002 ("AUMF") to launch a war against Iraq without a clear Declaration of War from Congress. A declaratory judgment will remedy the harms the Petitioners have suffered by declaring their rights as advocates of the original understanding of the United States Constitution to know if the

Presidency is violating Article I, Section 8, Clause 11 by continuing to use AUMFs without a Declaration of War from Congress.[5] Only a judicial decree can ensure future compliance by the Presidency and Congress with the Constitutionally required procedure for declaring war.[6]

Only a decision by this Court can provide "The People of the United States" with a definitive declaration of the original intention of the Framers with regard to the Declare War Clause. It cannot seriously be denied that a decision by this Court declaring the procedures that must be followed before the President orders the invasion of a sovereign nation without clear provocation would affect all future debates regarding issues of war and peace.

Further, advocates of the original understanding of the Constitution, including the Petitioners, will be given a concrete legal ruling

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5 In *Larson v. Valente*, the Court stated that "appellees will be given substantial and meaningful relief by a favorable decision of this Court" if a declaratory judgment is granted declaring the act unconstitutional. 456 U.S. 228, 243, 102 S. Ct. 1673, 1682, 72 L. Ed. 2d 33, 47 (1982).

6 Although clarification will not have stopped the Iraq War, or cured the emotional and physical injuries the Plaintiffs' received, clarification in the form of a judicial declaration will offer Petitioners' closure and finality, which is an invaluable form of redress. The Court has consistently emphasized that the public has a strong interest in finality in its cases. *See Cardinal Chem Co. v. Morton Int'l*, 508 U.S. 83, 100, 113 S. Ct. 1967, 1977, 124 L. Ed. 2d 1, 17 (1993); *Horne v. Flores*, 129 S. Ct. 2579, 2596, 174 L. Ed. 2d 406, 423 (2009).

that will enable them to enforce the Constitution's procedural requirements for declaring war. This Court's rulings have historically aided those who have worked to protect and safeguard the integrity of the U.S. Constitution.

For example, although the ruling in *Brown*, 347 U.S. 483, did little in and of itself to end racial animosity among Americans, this Court's decision motivated and empowered civil rights groups to continue to fight for racial equality and desegregation in the face of huge societal obstacles.[7] Similarly, *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), a case providing juveniles with the due process rights to an attorney, notice, confrontation, cross-examination, and a transcript, "energized children's advocates in the 1970s to challenge the squalid conditions of confinement prevalent in many of the nation's secure juvenile correctional institutions."[8]

Thus, the Court of Appeals committed plain error when it held that a judicial declaration proclaiming that the presidency violates the Constitution when it initiates a war without a Congressional Declaration of War would be ignored by the President and Congress and therefore would

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[7] *See* Michael R. Kuffner, *From Public Schools to Public Libraries: Examining the Impact of Brown v. Board of Education on the Desegregation of Public Libraries*, 59 Ala. L. Rev. 1247, 1251-52 (2008).

[8] See Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 Or. L. Rev. 1001, 1007-08 (2005).

not be able to provide any redress of the Petitioners' injuries. This Court should grant review in order to correct that plain error. It is certain that this Court's declaration will not be ignored.

## II. PETITIONERS HAVE STANDING TO INVOKE THE POWER OF THE JUDICIARY TO EFFECTUATE THE PROCEDURAL REQUIREMENTS OF THE DECLARE WAR CLAUSE OF THE CONSTITUTION

The Founders and the People who ratified the Constitution intended to protect exactly the interests asserted by Petitioners when they gave Congress the exclusive power to declare war in Article I. Thomas Jefferson said it best: "[Article I, Section 8, Clause 11 provides] an effectual check to the Dog of War by transferring the power of letting it loose from Executive to Legislative body, from those who are to spend to those who are to pay." THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON, 397 (Julius P. Boyd, ed.) (1955).

Petitioners are asking the courts to issue a Declaratory Judgment stating that the separation of powers established by the Constitution is real and that the procedural requirements of the Declare War clause must be adhered to before the President can invade a sovereign nation that has not attacked the United States. Petitioners seek a declaration that the requirement that only Congress can "Declare War" is not a merely

theoretical construct that may be evaded at will. In other words, "those who are to pay" for the war are here asking the Court whether the Constitution actually provides the "effectual check to the Dog of War" that the Founders intended.

Petitioners are among those who actually fought and paid for the War in Iraq. Therefore injury-in-fact and causation requirements of Article III standing doctrine should be assumed.[9] Accordingly, Petitioners are appropriate representatives of the "People of the United States," who are both the creators of the Constitution and the intended beneficiaries of its fundamental limitations on the power to declare war.

The Founders certainly intended that the Declaration of War requirements of the Constitution would be respected and enforced. As Alexander Hamilton wrote:

> There is no position that depends on clearer principles, than that every act

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[9] While all of the Petitioners have alleged taxpayer and other factual bases for standing, the injuries alleged by Wheeler, Rogovin and Berlinrut, in particular, will demonstrate that Petitioners have more than a generalized grievance. "[N]o major war in our history has been fought with a smaller percentage of this country's citizens in uniform full-time [than Iraq] – roughly 2.4 million active and reserve service members out of a country of over 300 million, less than one percent." Robert M. Gates, *Lecture at Duke University (All-Volunteer Force)*, Dept. of Defense (Sept. 29, 2010), http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1508.

> of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. . . . To deny this would be to affirm that the deputy is greater than his principal; . . . that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

*The Federalist No. 78.* The debate at the Conventions drafting and ratifying the new Constitution often stressed the power of the courts to insure that neither Congress nor the Executive would usurp, or exercise power beyond that granted by the Constitution.

> If Congress exceeds its powers, said George Nicholas in the Virginia Convention, "the judiciary will declare it void." [JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY GENERAL CONVENTION AT PHILADELPHIA IN 1787, VOL. III, 443 (1866).] Samuel Adams said in the Massachusetts convention that "any law . . . beyond the power granted by the proposed constitution . . . [will be] adjudged by the courts of law to be void." 2 [*id.*] 131. Oliver Ellsworth told the Connecticut

> convention that "a law which the Constitution does not authorize" is void, and the judges "will declare it to be void." 2 [*id.*] 196. Similar statements were made by Wilson in Pennsylvania, 2 [*id.*] 446, and by John Marshall in Virginia, 3 [*id.*] 553.

Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L. J. 816, 834 n.94 (1968-69).

While much of the original debate was framed in terms of the courts' ability to restrain congressional action, *Marbury* made it plain that the courts' power extended equally to executive acts and that such power was "deemed fundamental" to a constitutional system. 5 U.S. at 176. As Justice Marshall wrote:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it . . . [I]f the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

*Id.* at 176-77.

The history of the Constitutional Convention makes it clear that the Constitution's procedural requirements for declaring war are among "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 788 (1997) (Rehnquist, C.J.) (internal citations omitted). *See* n.2, *supra*. Thus, the Judiciary, and this Court in particular, necessarily has the power *and the duty* to effectuate the procedural requirement that only Congress can "Declare War" when the Executive disregards it. There is simply no other way in which these fundamental rights can be enforced.

Plaintiffs' core claim is that they have standing to seek a Declaratory Judgment because they are among "the People of the United States, [who] in Order to form a more perfect Union" established a constitution that imposed explicit procedural requirements that must be followed before the Nation's lives and treasure are expended to attack a sovereign foreign power and they are among those who suffered injury because President Bush violated of those requirements. *See Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 526 n.24, 127 S. Ct. 1438, 1458 n.24, 167 L. Ed. 2d 248, 273 (2007) (quoting *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 412 U.S. 669, 687-88, 93 S. Ct. 2405,

2416, 37 L.Ed. 2d 254, 270 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody").

The question presented by the Petitioners is not the political one of whether it was a good idea or a bad idea to invade Iraq. Rather, the question is what procedures must the Nation follow before war is declared. Article I, Section 8, Clause 11 unambiguously answers the question: "Congress shall have the power . . . to Declare War."

Surely, someone must have standing to seek judicial enforcement of such an unambiguous Constitutional provision. If not these Petitioners, who? If not now, when? Cf. Rabbi Hillel, *Pirkei Avot* 1:14.

Admittedly, the redress that Petitioners are capable of obtaining is limited and imperfect. The Iraq War cannot be undone. Constitutional standing, however, does not require perfect redress. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 769 n.2, 105 S. Ct. 2939, 2950 n.2, 86 L. Ed. 2d 593, 609 n.2 (1985). It is sufficient that there is *some* redress that a court can provide - something that is certainly possible in the present case. A Declaratory Judgment in favor of Plaintiffs can return our nation to the original intention of Article I, Section 8, Clause 11.

A decree that the President must abide by the requirement that only Congress may Declare War will re-enable the Declare War Clause to serve

its original intent of providing "an effectual check to the Dog of War by transferring the power of letting it loose from Executive to Legislative body, from those who are to spend to those who are to pay." *See* THE PAPERS OF THOMAS JEFFERSON, *supra*.[10]

Unstated in the lower courts' decisions, but implicit in their reasoning, is the radical proposition that absolutely no one has standing to bring the question raised by this case at any time. Similarly, unstated is the proposition that only Congress can enforce its Article I duties, and that if Congress chooses to abdicate those duties, then the People have no recourse, since none among them

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[10] James Wilson of Pennsylvania, speaking to that state's ratifying convention, similarly emphasized the importance of Congress declaring war:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the house of representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

Jonathan Elliot, *The Debates In the Convention of the State Of Pennsylvania, On The Adoption Of The Federal Constitution*, in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Vol. II*, 528, http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field (DOCID+@lit(ed0028)) (last visited Oct. 31, 2010).

can ever satisfy the pinched notions of standing that the lower courts adopted.[11]

This plainly is not the law the Founders intended. The Founders recognized that the power to declare war upon a foreign sovereign nation is the most fearsome power held by the United States. The Founders feared that power, and with good reason. War sets aside all ordinary notions of law and instead unleashes death and destruction upon every nation and person involved on a scale that is said to be unimaginable to those who have not directly experienced it. The Founders, "We, the People of the United States," those who tried their best to "form a more perfect union, establish Justice, insure domestic tranquility . . . and secure the Blessings of Liberty to ourselves and to our posterity," surely meant it when they wrote that *only Congress* has the power "To Declare War."

Accordingly, the Founders could never have intended to deprive the courts of the power to declare the meaning of that clause due to twisted theories of standing that make it impossible for anybody to prosecute a judicial challenge to that fearsome power. This Court can redress that injury to the Founders' intention by recognizing Petitioners' standing and by remanding this case to be heard and decided on its merits.

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[11] To this effect, see *John Doe I v. Bush*, 322 F.3d 109, (1st Cir. 2003); *Massachusetts v. Laird*, 451 F.2d 26, 33 (1st Cir. 1971).

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant review in this matter.

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